

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

DEC 17

MM Docket No. 93-3021

In re Applications of

VICTORY CHRISTIAN                      File No. BPH-920326MA  
CENTER, INC.  
(hereafter "VCC")

INTERMART                                File No. BPH-920326MB  
BROADCASTING  
OF NORTH CAROLINA, INC.  
(hereafter "InterMart")

TODD P. ROBINSON                      File No. BPH-920327MI  
(hereafter "Robinson")  
SATURDAY                                File No. BPH-920327ML  
COMMUNICATIONS  
LIMITED PARTNERSHIP  
(hereafter "SCLP")

For Construction Permit  
for a New FM Station on Channel 224A  
in Harrisburg, North Carolina

# HEARING DESIGNATION ORDER

Adopted: December 7, 1993;    Released: December 17, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Engineering Discrepancies---VCC.* An engineering review of VCC's application, as timely amended on June 29, 1992 during the amendment-as-of-right period, reveals discrepancies in the amendment. First, Items 7(a)(3) and 7(b)(2) show figures of 259 meters and 243 meters for the height of the tower above mean sea level (AMSL) and height of the antenna radiation center AMSL, respectively. These figures differ from the tower sketch, which shows the tower height AMSL as 311 meters and the antenna radiation center AMSL as 306 meters. Noting that VCC's engineering studies show that VCC's proposed station contours were generated using an AMSL value of 306 meters, and further noting that the tower sketch shows 259 and 243 as being the values in feet for the heights of the tower above ground level and the antenna radiation center above ground level, we can confidently and reliably determine that the 259 and 243 values in Items 7(a)(3) and 7(b)(2) are in error and that these figures should be 311 and 306 meters, respectively. These discrepancies do not by themselves render the amendment unacceptable for filing.

3. Nevertheless, VCC's amendment proposed processing under the contour protection rule 47 CFR § 73.215 in order to avoid a spacing deficiency under 47 CFR § 73.207 with respect to first-adjacent channel Class C station WZNS, Dillon, SC. VCC's analysis (using the correct 306 meter figure for the height of the antenna radiation center AMSL) concludes that no prohibited contour overlap will occur. However, an analysis conducted by the staff reveals that this result is in error. Specifically, the staff's computer generated study finds that prohibited contour overlap up to a maximum of 2.1 km in depth will occur between VCC's proposed 60 dBu protected contour and the 54 dBu interfering contour of WZNS, between the azimuths of 109° to 135°, as referenced to VCC's amendment. It appears that VCC's analysis did not use a sufficient number of radials to accurately predict the location of WZNS' 54 dBu contour. Thus, the amendment is unacceptable for filing and will be returned.

4. *Late-Filed Amendment/"Good Cause".* On August 11, 1992, Robinson submitted a petition for leave to amend his application. The engineering amendment proposed to change Robinson's transmitter site. The petition claims "good cause" for the late-filed amendment, explaining that: "Within the last six weeks, Todd Robinson, in consultation with his engineer, realized that the initial application did not specify the intended site but a site located 220 meters from the intended site." However, the petition is unaccompanied by any supporting affidavits of Robinson, his engineer, or any other person with first-hand knowledge of how the alleged misspecification occurred. Therefore, we do not find that good cause for the late filing of the amendment has been adequately shown, *see Erwin O Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), and we will return the amendment. This action is without prejudice to Robinson's right to refile the amendment, accompanied by an appropriate good cause showing, before the presiding Administrative Law Judge, who will then determine whether good cause has been established.

5. *Environmental.* Our engineering review of InterMart's and SCLP's applications, which propose the same transmitter site, reveals the presence of several other antennae on the tower structure. In accordance with the Commission's OST Bulletin No. 65, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation", released October 1985, and the *Public Notice*, entitled "Radiofrequency Radiation and the Environment", released August 19, 1992, it is necessary for applicants to certify that an agreement is in effect among all tower users to reduce power or cease operation as necessary to protect workers from exposure to excessive levels of radiofrequency radiation. In addition, Robinson's proposal indicates that workers will be protected from excessive levels of radiofrequency radiation but fails to indicate what steps will be taken to insure such compliance. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that InterMart, SCLP and Robinson may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307

criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since InterMart, SCLP and Robinson failed to indicate satisfactorily how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, they will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, InterMart, SCLP and Robinson will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

6. *Financial.* In response to Section III, FCC Form 301, SCLP certifies that it has sufficient funds to construct and operate the proposed station (Item 1), and has provided the source of funds together with the amount of funds to be supplied from each source (Item 3). However, SCLP has not provided the estimate of the total funds necessary to construct and operate the proposed facility (Item 3). SCLP shall submit an amendment, providing the financial information, with the presiding Administrative Law Judge.

7. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although SCLP has filed such statement, it is deficient. SCLP has not listed any recruitment sources for women. Accordingly, SCLP will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. *FAA.* Attempts to obtain FAA clearance through the Commission's Support Services Branch and VCC or Robinson have been unsuccessful. Accordingly, since no determination has been received as to whether the towers proposed by VCC or Robinson would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. *Late-Filed Amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amend-

ments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
InterMart	9/25, 11/13/92, 1/4/93 3/11, 5/3/93
VCC	7/21, 9/22/93

10. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. **ACCORDINGLY, IT IS ORDERED**, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by VCC or Robinson would constitute a hazard to air navigation.
2. If a final environmental impact statement is issued with respect to InterMart, SCLP or Robinson in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. **IT IS FURTHER ORDERED**, That the amendment filed on June 29, 1992 by VCC IS RETURNED.

13. **IT IS FURTHER ORDERED**, That the amendment filed on August 11, 1992 by Robinson IS RETURNED.

14. **IT IS FURTHER ORDERED**, That in accordance with paragraph 5 hereinabove, InterMart, SCLP and Robinson shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. **IT IS FURTHER ORDERED**, That SCLP shall submit the information specified in Paragraph 6, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. **IT IS FURTHER ORDERED**, That within 30 days of the release of this Order, SCLP shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

17. **IT IS FURTHER ORDERED**, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by InterMart (9/25, 11/13/92, 1/4, 3/11 and 5/3/93) and VCC (7/21 and 9/22/93) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. See generally *Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

#### FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief  
Audio Services Division  
Mass Media Bureau